FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 14 1946
CHARLES ELMORE CROPLEY

Nos. 809-811.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

BRIEF FOR THE CONGRESS OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

JOHN C. GALL
Special Counsel for
The Congress of the United States
Under House Resolution 386 and Public Law 249
78th Congress

March, 1946.
Southern Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Statement	2
The Essential Facts	3
Court of Claims Decision	6
Reasons for Granting the Writs	8
Conclusion	13

CITATIONS.

Cases:	
Dunwoody v. *United States*, 143 U. S. 578	10, 11
Embry v. *United States*, 100 U. S. 680-685	11
United States v. *Dickerson*, 310 U. S. 554	10
United States v. *Mitchell*, 109 U. S. 146	10, 11
United States v. *Vultee*, 283 U. S. 509	10
Statutes and Resolutions:	
Public Law 132, 78th Cong.	2, 4
Public Law 249, 78th Cong.	2
16 Stat. at L.	6
36 Stat. 1135	6
47 USC 154 (f) (g)	4, 10
48 USC 1405 (v)	5, 10
H. Res. 105, 78th Cong.	3
H. Res. 386, 78th Cong.	2
Congressional Documents:	
H. Rept. 448, 78th Cong.	9
H. Rept. 593, 78th Cong.	9
H. Rept. 607, 78th Cong.	9
H. Rept. 618, 78th Cong.	9
H. Rept. 661, 78th Cong.	9
H. Rept. 1117, 78th Cong.	2
H. R. 2714, 78th Cong.	9
S. Doc. 133, 79th Cong.	6
S. Rept. 724, 78th Cong.	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 809.

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT.

No. 810.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON.

No. 811.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

BRIEF FOR THE CONGRESS OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

I.

OPINION BELOW.

The opinion of the Court of Claims entered in the above-captioned cases on November 5, 1945, has not been officially reported.

II.

JURISDICTION.

The petition herein sets forth the statute under which the jurisdiction of this Court is invoked.

III.

STATEMENT.

The Congress of the United States submits this brief in support of a petition filed by the Solicitor General on behalf of the United States for writs of certiorari to review the decision of the Court of Claims in the above cases.

On December 6, 1943, respondents having filed petitions in the Court of Claims, the Attorney General advised the Congress, *inter alia*, that he found it impossible to advocate the views of the Congress with conviction and that the Congress should be afforded an opportunity to be represented by its own counsel.[1]

Special Counsel for the Congress filed a brief and argued these cases in the lower court pursuant to House Resolution 386[2] and Public Law 249[3] adopted in order that counsel

> "be permitted to defend the action of the Congress in enacting Section 304 of Public Law 132."[4]

The Court of Claims recognized counsel from the Department of Justice "for the Attorney General," (R. 18) and noted that

> "The Attorney General having heretofore . . . taken the position that the section was unconstitutional, and still adhering to that position, the Assistant Attorney

---

[1] The Attorney General also referred to the President's opinion that the challenged section was unconstitutional. See H. Rept. 1117, 78th Cong., 1st Sess., Com. on Judiciary.

[2] 78th Cong., 1st Sess.

[3] 78th Cong., 2d Sess.

[4] Sen. Rept. 724, 78th Cong., 2d Sess., Com. on Judiciary.

General, appearing for the defendants, supports the plaintiffs." (R. 34)

The Essential Facts.

The Court of Claims, upon stipulated facts, made special findings of fact, which are reported as a part of its judgments in these cases. (R. 19) For the purpose of this brief, the facts are, briefly, as follows:

Following certain Congressional inquiries and investigations made by several Government agencies, including the Federal Bureau of Investigation, the House of Representatives created a special subcommittee of the Committee on Appropriations (hereinafter referred to as the "Kerr Subcommittee")

> "to examine into any and all allegations or charges"

with respect to subversive activities on the part of certain

> "persons in the employ of the several executive departments and other executive agencies . . . with the view of obtaining all available evidence bearing on each particular case and reporting to the House the conclusions of the Committee with respect to each case in the light of the factual evidence obtained." (H. Res. 105, 78th Cong.)

Various employees, including the respondents, voluntarily appeared before the Kerr Subcommittee; and each of the respondents was given

> "full opportunity to make any statements or explanations he desired with respect to the subject matter of the investigation." (R. 21, 27, 31)

Having examined evidence adduced during investigations made by various executive agencies and the House Committee on Un-American Activities, the Kerr Subcommittee reported its findings to the Committee on Appropriations, which, in turn, recommended to the House of Representa-

tives an amendment to the Urgent Deficiency Appropriations Bill of 1943. Subsequently, the amendment was enacted as Section 304 of Public Law 132, approved July 12, 1943, and provides:

> "Sec 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943; *Provided further*, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom." (R. 22.).

Notwithstanding the above statutory notice contained in the Urgent Deficiency Appropriation Act, approved by the President of the United States July 12, 1943, the respondents were permitted by their employing agencies to remain in their positions after November 15, 1943, although none of them was nominated and confirmed in accordance with Section 304. At the time Section 304 became effective, respondents Watson and Dodd were employees of the Federal Communications Commission, having been appointed pursuant to Section 4 of the Federal Communications Act of 1934, which provides, *inter alia*, that

> "The Commission shall have authority, subject to the provisions of the civil-service laws and sections 661 to 674 of Title 5, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and

other employees as are necessary in the execution of its functions . . .

"(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress . . ." *47 U. S. C. 154 (f), (g)*

Respondent Lovett occupied the position of Executive Assistant to the Governor of the Virgin Islands, having been appointed under Section 23 of the Act of June 22, 1936, which provides:

"The Secretary of the Interior shall appoint such other executive and administrative officers as may in his discretion, be required . . . The salary of all executive officers and employees appointed . . . by the Secretary of the Interior shall be paid from funds appropriated for the Government of the Virgin Islands by the Congress in annual appropriation bills, or as may be otherwise provided by law . . ." *48 U. S. C. 1405(c)*

Respondent Watson resigned his position May 21, 1944 (Watson, Fdgs. 3, R. 24, 25); Dodd remained as an employee through November 21, 1943 (Dodd, Fdgs. 3, R. 30); Respondent Lovett continued as a federal employee until he resigned March 13, 1944 (Lovett, Fdgs. 3, R. 19, 20).

On December 6, 1944, each of the respondents filed petitions in the Court of Claims to recover compensation equivalent to salary for services rendered after November 15, 1943, alleging a demand for payment thereof and a refusal because of Section 304

"and the fact that the President did not appoint him thereunder."

The court below considered the three cases together and gave judgments for the then plaintiffs, which judgments the Court said

"may be satisfied by any appropriation out of which judgments may be by Act of Congress payable." (R. 40)

Congress has not made any appropriation out of which these judgments can be paid.[5]

Court of Claims Decision.

The Court of Claims concluded that Section 304 did not affect respondents' right to compensation for services performed after November 15, 1943. The decision was based upon several premises summarized by the Court of Claims as follows:

"The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is [in] no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continue to this day." (R. 40, 41)

The cornerstone of the Court's reasoning is its assumption that after November 15, 1943, the respondents validly occupied offices to which compensation had been affixed and which compensation Congress could not prospectively deny

[5] On January 17, 1946, the Court of Claims reported to the Congress, *inter alia*, that it had rendered judgments in favor of respondents. The Court's report (S. Doc. 133, 79th Cong.) furnished a synopsis of the nature of the claims in compliance with Section 143 of the Act of March 3, 1911 (36 Stat. 1135).

except by abolishing the office, by removing salary from the office or by removing the incumbent. At various points in its opinion the Court emphasized that in these cases Congress did none of these things, stating:

> "There was no removal of the officer from the office, no removal of the salary from the office." (R. 37)
> "Granted that an appropriation act may be something more than an accounting process, in the case we have here Section 304 makes no attempt to change or do away with compensation attached to the offices held by the plaintiffs." (R. 39, 40)
> "The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit the plaintiffs from receiving their salaries." (R. 40)

Upon that premise the Court supported its finding that Section 304 did not limit the appropriations available to pay respondents' salaries, but "merely stopped payment in three specific instances . . . regardless of obligation." (R. 40)

The Court's finding that the provision was a bare caveat issued against disbursing officers and was not intended to deny pecuniary obligations in a large measure resulted from its assumption that compensation was not removed from the offices held by the respondents and that Section 304, by merely denying payment to the respondents did not affect their rights to the compensation of the offices they held.

Because of that construction the Court concluded that, "It is immaterial whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, or any part thereof is constitutional or not. We do not decide that question. The plaintiffs are entitled to recover in either event."

However, three of the judges, in separate concurring opinions, expressed their views that Section 304 is unconstitutional; and it is doubtful whether the apparent conflict between the concurring opinions and the opinion of the Court can be reconciled by the theory that the concurring

opinions were intended as dicta on a point which the judges recognized as unnecessary to the decision.

In his concurring opinion, Mr. Justice Whittaker remarked:

> "I desire to state very briefly the reason for my concurrence in the result reached by the Court." (R. 41)

Mr. Justice Jones said:

> "I concur in the result. The single issue in this case is whether Section 304, as worded, is a valid exercise of the constitutional powers of the Congress". (R. 42)

Mr. Justice Madden, "concurring in the result," clearly indicated that his concurrence resulted from his conviction that the statute was unconstitutional, stating in conclusion that because of the unconstitutionality of the provision "we must disregard Section 304". (R. 48)

The anomalous situation prevails, therefore, in which the Court as an entity found the constitutionality of Section 304 immaterial, while a majority of the Court have indicated their views that the constitutional questions were material and that the statute is unconstitutional.

IV.

REASONS FOR GRANTING THE WRIT.

The confusion resulting from the apparent conflict between the decision of the Court and the separate concurring opinions of the majority of the justices warrants review of these cases. The importance of the issues involved necessitates a conclusive determination regarding the effect and the validity of the action taken by Congress in Section 304 of the Urgent Deficiency Appropriation Act, 1943.

However, even if the concurring opinions be disregarded, the conclusion that Section 304 did not affect respondents' right to compensation should be reviewed.

The petition for writs of certiorari submits as error the holding, "that Section 304 of the Urgent Deficiency Appro-

priation Act, 1943, had not terminated the respondents services but had merely prohibited the disbursing agencies from paying their salaries." (pp. 8, 9) While we concur in the opinion that the Court of Claims erred by holding that Section 304 was a bare caveat issued against the disbursing officers of the Government, we respectfully submit that under the circumstances of these cases office and compensation were not inseparable. The Court of Claims erred, not by finding that Section 304 did not remove respondents, but by concluding that because it did not the respondents acquired a right to compensation for the services performed after November 15, 1943.

The legislative history of the measure, considered in connection with the statutes under which the respondents were appointed, shows that when Congress enacted Section 304 it intended to deprive the executive agencies of authority to compensate respondents for such services. It necessarily follows that Congress could not have intended to leave with the executive agencies authority to obligate the Government for payment of the salaries while prohibiting their payment.

Section 304 was introduced as an amendment to an appropriation bill—H. R. 2714, 78th Congress, First Session. The purpose of the provision as originally drafted was to "deny the use of federal funds for the payment of salary or compensation for the personal services" of the respective respondents (Report of Committee on Appropriations, House of Representatives Report No. 448, 78th Congress, First Session). Subsequent reports of the legislative conferences to which the measure was submitted reveal no deviation from that purpose other than to include the condition regarding Presidential appointment and Senate confirmation (House Reports Nos. 593, 607, 618 and 661, 78th Congress, First Session).

Respondents Watson and Dodd were appointed pursuant to general authority granted the Federal Communications Commission to appoint necessary personnel, subject to the provision that such employees should be paid only from

such funds as the Congress might from time to time appropriate. *47 USC, Sec. 154*

The Secretary of the Interior appointed respondent Lovett pursuant to similar statutory authority. *48 USC, Sec. 1405 (v)*

Congress traditionally has asserted the power to repeal, suspend and modify authorizations previously conferred by a refusal to appropriate the necessary funds, and the courts have sustained such action. (*United States* v. *Dickerson*, 310 US 554; *United States* v. *Mitchell*, 109 US 146; *Dunwoody* v. *United States*, 143 US 578; *United States* v. *Vultee*, 233 US 509)

In the light of the legislative history, there can be no contention in these cases that the action taken was not deliberate. We are not dealing here with a situation in which the legislature inadvertently failed to provide the money necessary for the exercise of a disbursing authority previously conferred and not specifically revoked.

We are dealing here with a situation in which the Congress, having granted the Federal Communications Commission and the Secretary of Interior the power to engage personnel for compensation within the limits of appropriated money, deliberately has limited the appropriations otherwise available to these agencies for payment to respondents.

It is a cardinal principle of statutory construction that the intention of the legislature must be effectuated. In reaching the decision it made in these cases, the Court of Claims misinterpreted the intention motivating the enactment of Section 304.

As previously indicated, this interpretation of the Court of Claims largely is ascribable to its assumption that in these cases office and compensation were inseparable.

The Constitution vests only the President and the judges of the federal courts with a right to compensation. All other officers and employees of the Government must rely on legislation for any right to compensation they possess.

and none can possess a vested right. The compensation and offices held by them are separable.

In *Embry* v. *United States*, 100 U. S. 680-685, the Supreme Court clearly pointed out that office and compensation are separable. The case involved a postmaster's claim for salary during the period he was suspended, pursuant to the Act of April 5, 1869, 16 Stat. at L. 6. The Court said:

> "We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitutional question which has at times occupied the attention of the Political Department of the Government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved. The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the Judges of the Courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a Judge of a Court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign."

The Congress may directly create an office and append to it a designated compensation. Having so done, the legislature may reduce or eliminate compensation affixed to such office without destroying the office itself. (*Dunwoody* v. *United States, supra; United States* v. *Mitchell, supra*)

That reduction or elimination may be effected either by general legislation or by a deliberate refusal to appropriate the funds necessary to pay the compensation previously affixed. (*Dunwoody* v. *United States, supra*)

However, the Congress may invest executive agencies with general authority to employ personnel necessary for the performance of the functions assigned to them, granting to such agencies the power to compensate such personnel within the limits of appropriated funds. One of the funda-

mental questions presented in these cases is whether compensation is inseparably affixed to offices created by executive agencies pursuant to general authority to engage necessary personnel.

The Court of Claims has assumed that compensation does attach to such offices and that the power of a *de jure* incumbent of such an office to acquire a right to compensation for future services may be destroyed only by removal from office, destruction of the office or elimination of the compensation attached to the *office*.

We respectfully urge that where the Congress has delegated to executive agencies the authority to engage necessary personnel to create offices for such personnel, and appoint thereto for compensation, all within the limits of appropriated money, then the Congress may validly revoke the authority to pay or to create an obligation to pay particular persons by a refusal to make available the necessary funds; and that by enacting Section 304 Congress did just this.

Whether Congress constitutionally can exercise such a power is of primary importance. The size and complexity of the Governmental structure necessitates the delegation of broad authority to create positions and appoint necessary employees. However, the Constitution vests in the legislature the exclusive duty of controlling and directing the disbursement of the public funds.

Under the ruling of the Court of Claims the refusal to authorize payment of particular persons appointed pursuant to such general authority is merely a repudiation of a valid obligation and does not curtail the previously conferred authority to obligate the Government. The effect of its decision is to hold that when the Congress confers the general authority to employ necessary personnel, it grants a vested right to compensate such personnel, and waives its power to direct and control the future expenditure of public monies.

The decision is based upon a misinterpretation of the legislative intention and an erroneous assumption that in these cases compensation and office were inseparable.

V.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for writs of certiorari should be granted.

JOHN C. GALL
Special Counsel for
The Congress of the United States
Under House Resolution 386 and Public Law 249
78th Congress

Southern Building,
Washington, D. C.
March, 1946.